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JURIMETRICS: THE MEANING AND MEASUREMENT OF LEGAL SOVEREIGNTY AND DOMESTIC JURISDICTION

BIN CHENG*

SUMMARY

- I. THE CONCEPT OF SOVEREIGNTY
- II. DOMESTIC JURISDICTION
- III. JURIMETRICS

In a paper written not very long ago,¹ I referred to the use of the word "essentially" and to the omission of the reference to international law in Article 2(7), the domestic jurisdiction clause of the United Nations Charter, and to the Connally Reservation to the former (1946) United States acceptance of the Optional Clause jurisdiction of the International Court of Justice, as "legally illiterate." This observation may require some explanation and clarification, as well as the term sovereignty, which seems to continue to be a highly emotive source of confusion, especially when the spectre of its loss is raised. Furthermore, the United States challenge to the jurisdiction of the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua* Case (1984, 1986) suggests that the subject merits renewed and in fact urgent attention.²

In this context, one would do well to remember what Commissioner Fred K. Nielsen said in his dissenting opinion in the *International Fisheries Co. Case* (1931) before the Mexican-United States General Claims Commission (1923):

An inaccurate use of terminology may sometimes be of but little importance, and discussion of it may be merely quibble. But accuracy of expression becomes important when it appears that inaccuracy is due to a confusion of thought in the application of proper rules or principles of law.³

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¹ See Cheng, *Flight from Justiciability to Auto-Interpretative International Law: From the Jay Treaty to the Shultz Letter*, in LIBER AMICORUM ELIE VAN BOGAERT 3, 4 (1985).

² See *infra* note 51 and accompanying text. The case has since been discontinued, upon a request from Nicaragua agreed to by the United States, by an Order of the Court made by its President on 26 September 1991, 1991 I.C.J. 47.

³ 4 R. Int'l Arb. Awards 691, 731.

This paper hopes to show that, in international law, if these concepts are properly understood, a State's legal sovereignty can be exactly quantified and its domestic jurisdiction precisely determined, leaving no room for the confused concept of "essentiality."

I. THE CONCEPT OF SOVEREIGNTY

In order to define domestic jurisdiction, one has first to elucidate the concept of sovereignty. In this connection, what is necessary is to distinguish the concept of sovereignty in international law not only from that in domestic law, but also from the political concept of sovereignty whether in the internal or the international sphere. These are distinctions which are sometimes not clearly made. Thus, in his magistral work *Théories et réalités en droit international public*,⁴ even Charles de Visscher, in his effort to stress the "realities" of international law, seems to merge the international law concept of sovereignty with a State's political sovereignty, power or overall capability of acting as it pleases.

A close connection exists between political power and sovereignty under international law. Nevertheless they are distinct concepts. Sociologically, it is obviously true, as Professor de Visscher and many others have rightly reminded us, that, although law may be temporarily separated from political realities, it cannot survive long if permanently divorced from them. However, conceptually for the purpose of legal inquiry and operationally for the purpose of applying the law, it can be just as much a mistake not to appreciate the distinction between the distinctly different legal and political frameworks of discussion and analysis of inter-State relations as to ignore their underlying links. Political power or pre-legal sovereignty is a factual situation. An entity either has it or does not have it. Among those that have it, its strength can vary from entity to entity and is subject to no aprioristic limits. Sovereignty under international law on the other hand is a well defined juridical concept subject to clear-cut limits, applicable equally to all entities deemed to be sovereign. In order to facilitate discussion, we shall limit ourselves to territorially organised entities, namely States, excluding those that are not or no longer territorially organised, such as the Sovereign Order of Malta.⁵

The latter do, however, highlight the "constitutive" effect of recognition and show that, *pace* the International Court of Justice,⁶ international legal

⁴ See C. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*, Livre II, ch. III, § I (La souveraineté dans l'ordre externe) (1st ed. 1953), at 129; (English translation, 3rd ed. 1968), at 102; (4th ed. 1970), at 125.

⁵ Cf. *Sovrano Militare Ordine Di Malta c. Soc. Comaria, Italy* (Corte Cass., United Civil Sections) 1954 Foro It. I.24 (14 July 1953); 4 INT'L & COMP. L.Q. 486 (1955).

⁶ Cf. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 185 (Advisory Opinion of Apr. 11).

personality is primarily subjective. By "constitutive," it is not meant that recognition creates the international person. It means simply that, vis-à-vis the recognising party, recognition confirms or validates the international legal status of the entity in question, in the same way that admission to a club does not create the physical person that applies for membership, but it does confer membership on that person.

Basically, the structure of the international legal order remains that of a club, membership of which is voluntary and co-optative.⁷ The consent of States, which is the so-called basis of international law, is not, as is often assumed, their consent to individual rules, but their consent to join the international legal order. By joining the club, they consent to being bound henceforth by its rules. In turn, they receive the benefits to be derived from these rules.

The minimum conditions for States to join the international legal order have been summarised by the 1933 Montevideo Convention on Rights and Duties of States as: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."⁸ Again these conditions are mere facts which need to be assessed and given legal effect to by the existing members of the club either individually or, as it sometimes happens, for instance, *via* admission into an international organisation, collectively. Upon an entity (which may be referred to as a state with a small "s") being accepted by the recognising State or States as a member of the international legal order (a State with a capital "S"), legal attributes are, vis-à-vis the recognising State or States, attached to each of these elements and to the entity as a whole.

The entity's *de facto* independence, its *de facto* capacity to enter into relations with other States and its *de facto* control over a permanent population and a defined territory are now transformed into independence in law, capacity to enter into legal relations with other members of the international legal order, and legal authority over *its* population and *its* territory, all attributes recognised and hence to be respected by the recognising State or States.

Legal sovereignty is simply the sum total of these legal attributes. Thus Judge M. Huber in the *Island of Palmas* Case (1928) aptly said: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the functions of a State."⁹ Sovereignty and independence under

⁷ See also Cheng, *Custom: The Future of General State Practice in a Divided World*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513 (R.St.J. Macdonald & D.M. Johnston eds. 1983), at 516-519.

⁸ M.O. Hudson, 6 INTERNATIONAL LEGISLATION 620.

⁹ 2 R. Int'l Arb. Awards 821, 838 (1928).

international law, however, are no longer the same as pre-legal sovereignty and independence in the sense of being able to do whatever one wants. In fact, the moment a State joins the international legal order, its pre-legal freedom and independence of action are circumscribed. To borrow the words of Judge D. Anzilotti in his Individual Opinion in the *Austro-German Customs Régime* Advisory Opinion (1931), sovereign independence means no more than that: "the State has over it no other authority than that of international law."¹⁰

Unfortunately, the point that, within the international legal system, sovereignty and independence are subordinate to international law, and are in fact a function of international law, is often lost sight of even in discussions in an international law context.

From the standpoint of political science, it is easy to mock at the idea that sovereignty is an attribute defined by and subordinated to international law, and has to be validated and legitimised in accordance with procedures recognised by it. But international political science and international law operate within different frameworks. When a political entity joins the international legal order, it subordinates itself to international law and exchanges its pre-legal and anarchic freedom of action (pre-legal sovereignty) for legal sovereignty, which is freedom of action *within the law*.

This legal sovereignty consists in a bundle of legal powers, rights and duties, *basically identical* for all members. The consequence is that all members are *equal before the law*. Hence the principle of sovereign equality. Various attempts have been made in the past to define sovereignty or the rights and duties of States. Without seeking to emulate these efforts or to be exhaustive, some of the main attributes of legal sovereignty may be listed.

Thus a sovereign State:

I. Is automatically bound by the totality of general international law, *i.e.*, what is referred to in Article 38(1)(b) and (c) of the Statute of the International Court of Justice as international custom and general principles of law, and by general international law alone;

II. Is entitled to enter into treaty engagements, which become legally binding on it, obligations arising from such engagements being, however, merely restrictions on the exercise of its sovereign rights and not abandonments of its sovereignty;¹¹

¹⁰ *Austro-German Custom Régime*, 1928 P.C.I.J. (ser.A/B) No.41, at 55-57 (Advisory Opinion, Individual Opinion by Judge D. Anzilotti).

¹¹ *The S.S. Wimbledon*, 1923 P.C.I.J. (ser.A) No. 1, at 25:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind

III. Is not bound by any treaty or the provisions of any treaty to which it is not a party without its consent, unless the relevant provisions have actually become rules of general international law;¹²

IV. Cannot, "without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement,"¹³ resulting thus in the emergence of different "grades" of international law, namely, auto-interpretative, justiciable and judicial;¹⁴

V. Enjoys, within its territory, "the right to exercise therein, to the exclusion of any other State, the functions of a State,"¹⁵ known as its "territorial sovereignty," enabling it to exercise in respect of such territory, including all persons and things therein, territorial jurisdiction in both its prescriptive and implementation modes, namely, jurisfaction and jurisdiction;¹⁶

VI. Enjoys quasi-territorial sovereignty and jurisdiction over all its vehicles (be they ships, aircraft or spacecraft) that are capable of traversing international spaces (*i.e.* spaces, whether terrestrial, maritime or extra-terrestrial, which are either not subject to the sovereignty, or not capable of being subjected to the sovereignty, of any State), such jurisdiction extending to not only the vehicles themselves, but also to all persons and things on board, the

places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

This must be true also for a State's submission to general international law.

¹² See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980. Arts. 34, 38. See also Cheng, *supra* note 7, at 519-521, 526-533.

¹³ The Status of Eastern Carelia, 1923 P.C.I.J. (ser.B) No.5, at 27 (Advisory Opinion of Jul. 23, 1923).

¹⁴ See Cheng, *supra* note 1, at 14-18, and *passim*; and Cheng, *supra* note 7, at 522-526.

¹⁵ See The Island of Palmas Case, *supra* note 9, at 839.

¹⁶ On the notion of State jurisdiction, including its three types (territorial, quasi-territorial and personal) and two elements (jurisfaction and jurisdiction), and the hierarchy of these types and elements, see Cheng, *Crimes on Board Aircraft*, 12 CURRENT LEG. PROBL. 177, 181 (1955); Cheng, *Inter Astra Silent Leges?*, GLIM (Michaelmas, 1961), at 2; and Cheng, *The Extra-Terrestrial Application of International Law*, 18 CURRENT LEG. PROBL. 132, 134-142 (1965). Briefly, "jurisfaction" denotes the power of the State to take legal decisions, be they legislative, judicial or executive, with binding effect on anyone anywhere. Because of its nature, it may perhaps also be called normative State jurisdiction. "Jurisdiction" denotes the actual physical or concrete performance of the functions, or displays of the powers, of a State, and implementation or enforcement of its legislative, judicial or executive prescriptions. Hence it may perhaps also be called the concrete jurisdiction of a State. Traditionally the distinction between these two separate elements of State jurisdiction is not clearly made. The case of *The Lotus* (1927) decided by the Permanent Court of International Justice, 1927 P.C.I.J. (ser.A) No.9, at 18, shows the need for doing so. It also shows that, whereas the jurisfactions of different States can be concurrent and co-exist, jurisdiction normally can only be exclusive at any given time and place. In case of concurrence or conflict, territorial overrides quasi-territorial jurisdiction, and both override personal jurisdiction.

jurisdictional element of which, in case of conflict, gives way to territorial jurisdiction, but overrides personal jurisdiction;¹⁷

VII. Enjoys over its nationals (individuals or corporate bodies) personal sovereignty and jurisdiction, the jurisdictional element of which, in case of conflict, gives way to both territorial and quasi-territorial jurisdictions;¹⁸

VIII. Enjoys freedom of action over any matter within its "domestic jurisdiction," *i.e.*, any area of its legal sovereignty the exercise of which is not restricted by any rule of general international law or by any treaty obligation incumbent upon the State, as well as any obligation derived therefrom;¹⁹ and

IX. Is "free to renounce its independence and even its existence,"²⁰ although

X. Ordinarily "[r]estrictions upon the independence of States cannot . . . be presumed."²¹

It will be seen, even from such a summary list, that whilst the concept of legal sovereignty imposes important restrictions upon the pre-legal sovereignty of a State, it also confers upon it important legal rights. It has in this context to be remembered that, because of the principle of reciprocity, any duty imposed by general international law upon States represents also a corresponding right conferred on each of them to expect that such duty will be done to it by all the other States, and *vice versa*.

These are the initial starting points. On these premises, international law has over the ages evolved a number of rules which restrict the exercise of what might be called the primordial sovereignty of States in the interest of

¹⁷ *Id.* Contrary to Professor A. Górbieł's view in his *Space Objects in International Law*, 21 IL DIRITTO AEREO 75, 83 (1982) this approach is not the same as the "old theory" (*pace* the 1942 Italian Code of Navigation, Art. 4), that ships and aircraft are "floating" or "flying" parts of national territory, and, on account of the definite hierarchy between territorial, quasi-territorial and personal jurisdictions, poses no problem when a spacecraft "lands, on returning from outer space, on the territory of another State and not the one which launched it." The territorial jurisdiction of the foreign State prevails over the quasi-territorial jurisdiction of the State of registry of the space object and the personal jurisdiction of any astronaut on board. "Quasi-territorial" is merely the label of the jurisdiction which the State, to which these vehicles are internationally attributed, enjoys over them and over all persons and things on board. It is not an attempt to identify such vehicles with national territory. See also *The Extraterrestrial Application of International Law*, *supra* note 16, at 135; and, with reference to the hierarchy among jurisdictions, see page 140, as well as the chart on pages 138-139.

¹⁸ See *supra* note 16 and accompanying text.

¹⁹ See *infra* section II.

²⁰ Austro-German Customs Régime, *supra* note 10, at 59.

²¹ The *Lotus*, *supra* note 16, at 18.

international intercourse. These duties of States in the law of peace may conveniently be grouped under four headings:

1. Restrictions derived from the concept of sovereign equality and the co-existence of independent States: These are first the restrictions reflected largely in Article 2 of the United Nations Charter, particularly paragraphs (1), (2), (3) and, especially since the *Military and Paramilitary Activities in and Against Nicaragua* Case (Merits) (1986),²² (4), and in the United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970),²³ sometimes dubbed the Co-existence Resolution. Essentially the duties are to fulfill international obligations in good faith, to settle disputes peacefully and to respect the sovereign equality, political independence and territorial integrity of one another. Secondly, from this point of view, an offshoot of the principle of sovereign equality is the institution of foreign sovereign immunities encapsulated in the dictum: *Par in parem non habet jurisdictionem*.

2. Restrictions derived from the need for diplomatic and consular relations. The need of diplomatic and consular relations among States has engendered a number of rules restricting the exercise of the jurisdiction of States. These have now been largely codified in the 1961 and 1963 Vienna Conventions on respectively Diplomatic and Consular Relations.²⁴

3. Restrictions relating to the use of the high seas. Numerous rules come within this category, some of only relatively recent origin, particularly those introduced into general international law through the not-yet-in-force United Nations Convention on the Law of the Sea (1982). Among rules coming under this heading would be those on innocent passage through the territorial sea, piracy, hot pursuit, ships in distress,²⁵ international straits, transit passage and so forth.

4. Restrictions relating to the treatment of foreigners and their property. Without entering the controversy here as to whether there is a minimum standard or whether the standard is that of national treatment, it suffices in this context to say that rules of general international law definitely

²² Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14, 99 (para. 188). The Court regards Article 2(4) of the Charter as now declaratory of general international law.

²³ U.N. GAOR (25th Session)) Doc. A/RES/2625 (XXV); 1970 U.N.Y.B. 784.

²⁴ Vienna Convention on Diplomatic Relations, 1961, Multilateral, 23 U.S.T. 3229, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, opened for signature April 1963, Multilateral, 211 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261

²⁵ Cf. B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 75-77 (1953, 1987).

exist on the subject. In fact, it may even be said that there is now a definite tendency to seek the extension of the application of these rules to the treatment of all individuals under the jurisdiction of a State in order to bring about the international protection of human rights.²⁶

These rights and duties, being rights and duties under general international law, which are applicable to all States, are by definition the same for all States.

It may be mentioned that within these same rights and prerogatives, there remains plenty of scope for different States, with different political strengths, to exercise different impacts on the affairs of the world, and even the formation of rules of general international law.²⁷ This shows that the legal framework of analysis can appropriately and, if properly conducted, does include consideration of political and sociological factors, but the latter should not be allowed to disregard or even displace the original terms of reference or stray into a wrong framework of consideration and analysis. In particular, it should be remembered that, in the application of the law, all States are equal, and they enjoy equal rights and bear equal duties under general international law.

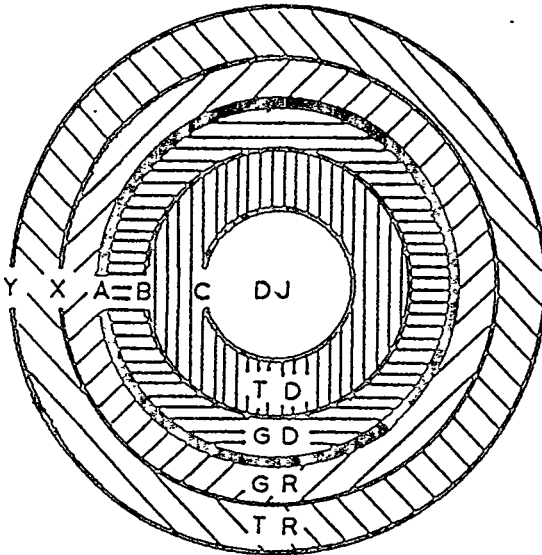
What has been said so far may be illustrated by the accompanying diagrams, each of which has five concentric circles. Full or primordial legal sovereignty is represented by the middle one of the five circles, drawn with a thicker line than the other four, which we shall call Circle A, and which describes the immediate restriction imposed on the pre-legal freedom of action of States by their joining the international legal order. The act of joining involves, at the very least, the recognition of the legal sovereignty of the other members of the international legal order, and the consequent and corresponding limitation of one's own pre-legal freedom of action, these being the minimum requirements of legal co-existence. The dimension of the area enclosed by this circle is consequently the same for all States, which is also an acknowledgement that, in the eyes of the law, they are all equal.

As has been mentioned before, legal sovereignty means also the submission to all the duties under general international law. The area between Circle A and the next circle towards the centre, which we shall call Circle B, represents that part of a State's sovereignty the exercise of which is governed by the rules of general international law. This area we shall call GD (duties under general international law). In principle, the size of this area should be the same for every State.

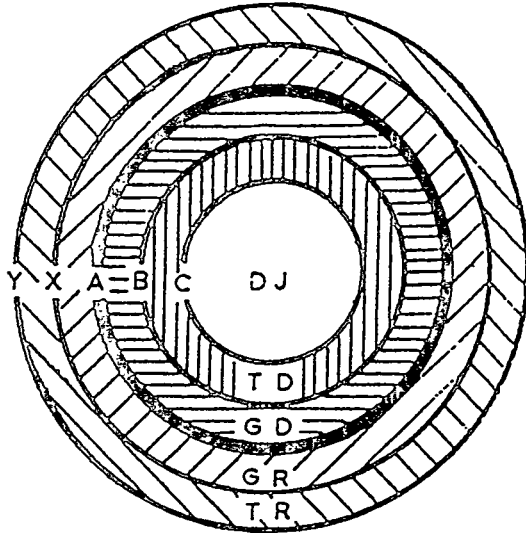
²⁶ Cf. B. Cheng, *The Contribution of International Courts and Tribunals to the Protection of Human Rights under International Customary Law*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 167 (A. Eide & A. Schou eds. 1968) (Nobel Symposium No. 7).

²⁷ See B. Cheng, *The Contribution of Air and Space Law to the Development of International Law*, 39 *CURRENT LEG. PROBS.* 181, 189 (1986): *The Role of the Dominant Section in the Making of General International Law*.

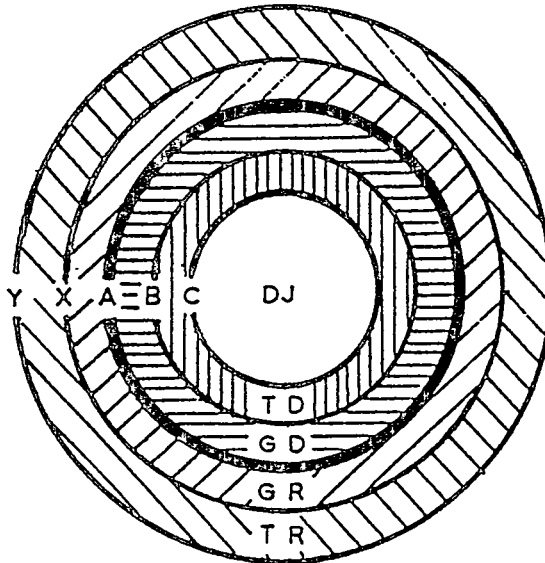
SOVEREIGNTY, INTERNATIONAL LAW
AND DOMESTIC JURISDICTION



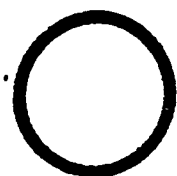
1. STATE A'S DOMESTIC JURISDICTION
VIS-A-VIS STATE B



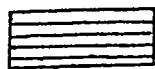
2. STATE A'S DOMESTIC JURISDICTION
VIS-A-VIS STATE C



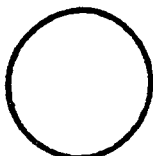
3. STATE D'S DOMESTIC JURISDICTION VIS-A-VIS STATE E



A General limit of sovereignty
under international law



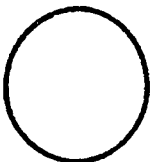
GD Sovereignty limited in exercise
by duties under general international
law



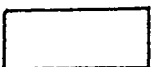
B Limit of duties under general
international law



TD Sovereignty limited in exercise
by duties assumed under treaties



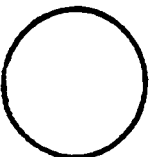
C Limit of treaty duties



DJ Domestic jurisdiction



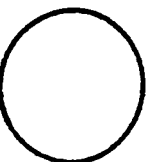
GR Rights conferred by general
international law



X Limit of rights under general
international law



TR Rights acquired under treaties



Y Limit of rights acquired under
treaties

Submission to general international law, as we have said, also brings about rights under general international law vis-à-vis other members of the international legal order. These rights are, therefore, bonuses derived from the joining of the international legal order and privileges accompanying the general restriction imposed on the pre-legal freedom of action of States on their joining the international legal order. These rights under general international law vis-à-vis other States are, in our diagrams, represented by the area GR (rights under general international law) between Circle A and the next circle outside it (Circle X). In principle, GR is also the same in size for every State. In many a discussion, especially by politicians, whilst the restrictions imposed by international law are emphasised, the benefits which it confers are often ignored.

II. DOMESTIC JURISDICTION

The concept of domestic jurisdiction²⁸ gained prominence under Article 15(8) of the League of Nations Covenant. Under Article 15 of the Covenant, any dispute between member States likely to lead to a rupture which was not submitted to arbitration in accordance with Article 13, had to be brought before the League Council. Article 15(8) provided, however;

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which *by international law is solely* within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement (emphasis added).

It is well-known of course that the United Nations Charter has turned the safeguard of the domestic jurisdiction of member States in relation to the process of settlement of disputes by the League Council into one of the basic Principles

²⁸ See P. Berthoud, *La compétence nationale des États et l'ONU*, 3 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 17 (1947); L. Preuss, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction* 74 RECUEIL DES COURS 553 (1949-I); Institut de Droit International, *La détermination des affaires qui relèvent essentiellement de la compétence nationale des États*, ANNUAIRE, 43-I (1950), at 5-41; 44-I (1952), at 137-180; 45-II (1954), at 108-199; C.H.M. Waldock, *The Plea of Domestic Jurisdiction before International Legal Tribunals*, 31 BRIT. Y.B. INT'L L. 96 (1954); B. Cheng, *The Rationale of Compensation for Expropriation*, 44 GROTIIUS SOCIETY TRANSACTIONS 167 (1958/59), at 275-280; M.S. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION (2nd ed., 1961); A. Verdross, *La 'compétence nationale' dans le cadre de l'organisation des Nations Unies et l'indépendance des États*, 69 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 314 (1965); A. Verdross, *Domestic Jurisdiction under International Law*, 1-2 U. TOL. L. REV. 119 (1971); N. Ouchakov, *La Compétence Interne des États et la Non-Intervention dans le Droit International Contemporain*, 141 RECUEIL DES COURS 1 (1974-I); A.A.C. Trindade, *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations*, 21 INT'L & COMP. L.Q. 715 (1976); J.S. Watson, *Auto-interpretation, Competence, and the Continuing Validity of Article 2(7) of the United Nations Charter*, 71 AM. J. INT'L L. 60, 749 (1977); G. Guillaume, *Article 2, Paragraph 7*, in LA CHARTE DES NATIONS UNIES 141 (J.-P. Cot & A. Pellet eds. 1985); A. D'Amato, *Domestic Jurisdiction*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 136 (R. Bernhardt ed. 1987) (installment 10).

governing the activities of the United Nations Organisation and its Members, when it lays down in its Article 2(7):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Insofar as the concept of domestic jurisdiction is concerned, the Charter has altered the formula in the Covenant by notably omitting the reference to international law as its measuring rod, and substituting "solely" with "essentially." These changes correspond to the notion of domestic jurisdiction in the so-called Connally Reservation to the United States' 1946 acceptance, since rescinded, of the jurisdiction of the International Court of Justice under the Optional Clause, which reservation excluded from the compulsory jurisdiction of the Court: "disputes with regard to matters which are *essentially* within the domestic jurisdiction of the United States of America as determined by the United States of America" (emphasis added).

Although the United States Reservation followed in point of time the United Nations Charter, there is little doubt that in point of substance it was the Charter which followed the views of the United States.²⁹ This should be apparent from the part played by John Foster Dulles, the United States Secretary of State, at the 17th meeting of Committee I/1 of the San Francisco Conference on 14 June 1945,³⁰ and his subsequent Report to the United States' President on the San Francisco Conference.³¹

In expounding the views of the four Sponsoring Governments which proposed the present wording of Article 2(7) and in opposing the amendments submitted by Greece and Belgium, which would have, *inter alia*, restored the criterion of international law and the word "solely" in the draft, Mr. Dulles said that what was needed was not "a technical and legalistic formula" in view of the "broadening of the scope" of the functions of the projected Organisation. According to the Summary Report of the meeting:

²⁹ Cf. Preuss, *supra* note 28, at 598 n.3, who conjectured that the word "essentially" might have been borrowed from a general introductory statement in the section on "Domestic Affairs" in the then recently published second edition (1944) of C.C. Hyde's *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES*, which was apparently much used by members of the United States delegation.

³⁰ Doc. 1019, I/1/42, at 1, in UNITED NATIONS, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION (UNCIO Doc.), at 507.

³¹ Report to the President on the Results of the San Francisco Conference by the Secretary of State. Department of State, Publication No. 2349, Conference Series 71, Washington, 1945.

In reply to the contention that domestic jurisdiction should be determined in accordance with international law, Mr. Dulles again pointed out that international law was subject to constant change and therefore escaped definition.³²

The Summary Report of the 17th Meeting further records that after Mr. Dulles' statement, the Chairman, Mr. Manuilsky from the Ukrainian S.S.R., "moved a vote of thanks to Mr. Dulles for his masterly exposition of the problem of domestic jurisdiction!"³³ The *Report to the President*, in justification of the substitution of the word "essentially" for "solely," said:

It seemed ineffectual to use 'solely' as a test in view of the fact that under modern conditions what one nation does domestically almost always has at least some external repercussions. It seemed more appropriate to look to what was the essence, the heart of the matter, rather than to be compelled to determine that a certain matter was 'solely' domestic in character.³⁴

Such remarks betray a fundamental misunderstanding of the concept of domestic jurisdiction, since the question of *jurisdiction* is by definition a legal matter, and not one of *repercussions*.

As regards the deletion of the international law criterion, the same *Report* stated: "This deletion was supported by the argument that the body of international law on this subject is indefinite and inadequate."³⁵ This can only be true by either ignoring or grossly misinterpreting the Permanent Court of International Justice's authoritative examination of the concept of domestic jurisdiction in its Advisory Opinion on *Nationality Decrees in Tunis and Morocco* (1923).³⁶ Although the Court was dealing with Article 15(8) of the League of Nations Covenant, what it said on domestic jurisdiction remains perfectly valid and pertinent today. However, the Court's Opinion is prone to misinterpretation.

In the first place, in rejecting the interpretation that domestic jurisdiction means the area where a State is legally entitled to act, the Court said:

From one point of view, it might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law --

³² *Id.* at 2, 508.

³³ *Id.*

³⁴ *Id.* at 45.

³⁵ *Id.* at 44.

³⁶ 1923 P.C.I.J. (ser.B) No.4 (Advisory Opinion of Feb. 7).

using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law. But a careful scrutiny of paragraph 8 of Article 15 shows that it is not in this sense that exclusive jurisdiction is referred to in that paragraph.³⁷

The meaning of the above passage is made clear by the sentence that preceded it, albeit in a separate paragraph: "The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs *solely* to that party."³⁸ As the Court made it even clearer afterwards, if it were otherwise, one would never be able, in a dispute, to answer the preliminary question whether the action of a State that is being impunged lies or does not lie exclusively within that State's domestic jurisdiction without first deciding the ultimate and substantive question whether that action is lawful or not, in other words, deciding first the merits of the dispute.³⁹ This, said the Court, "would hardly be in conformity with the system established by the [League] Covenant for the pacific settlement of disputes."⁴⁰ This conclusion is in fact applicable, not only to the League Covenant, but also to the pacific settlement of international disputes in general, as is clearly shown by the *Second Report* (1924) of Judge M. Huber on the British Claims in the Spanish Zone of Morocco (1923),⁴¹ whenever the exception of domestic jurisdiction or international justiciability is raised, whether such an exception be expressly stated or not.

The Court, after having rejected the above interpretation, went on to state:

The words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not in principle, regulated by international law. As regards such matters, each State is sole judge.

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are,

³⁷ *Id.* at 23 (original emphasis).

³⁸ *Id.* (original emphasis).

³⁹ *Cf. id.*, at 24: "To hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures."

⁴⁰ *Id.* at 26.

⁴¹ 2 R. Int'l Arb. Awards 615, 630.

in the opinion of the Court, in principle within this reserved domain.⁴²

The first sentence in the second paragraph is the source of a great deal of misunderstanding. *First*, it is sometimes relied upon to say that the question of domestic jurisdiction is a "relative" one, and, consequently, a matter can be more or less within domestic jurisdiction, leading thus to the notion of "essentiality," *i.e.*, that matters may be essentially or not essentially within domestic jurisdiction. *Secondly*, it is also invoked as the authority for saying that domestic jurisdiction is a question of "international relations" rather than international law, so that the international law criterion is in fact inappropriate.

It is submitted that both these interpretations are erroneous; for they would both be contradicting what Article 15(8) has specifically mentioned and what the Court had been emphasising. In fact, the Court had previously stressed: "Special attention must be called to the word '*exclusive*' in the French text [of Art. 15(8)], to which the word '*solely*' (within the domestic jurisdiction) corresponds in the English text."⁴³ Furthermore, as the quotation shows, both just before and in the sentence immediately after this first sentence in the second quoted paragraph, the Court referred to regulation by "international law." The truth is that the "relativity" which the Court said was dependent on the "development of international relations" was in fact the variation in the contents of international law depending on the development of international *legal* relations, in other words, on the development of international law, rather than on the development of international relations as such.

The international law referred to by the Court is general international law that is applicable *erga omnes* equally to all State subjects of international law. What it was saying is that the area within Circle B in our diagram is *in principle* domestic jurisdiction, but that the area GD (duties under general international law) between Circles A and B, as well as the corresponding area GR (rights under general international law) between Circles X and A, is liable to vary in dimension according to the development of general international law. It is in this sense that the dimension of the area not governed by general international law is consequently said to be relative. At the time of the Advisory Opinion, the Court decided that "questions of nationality are, in the opinion of the Court, in principle within this reserved domain." The above-mentioned errors in interpretation are often caused also by a failure to heed what the Court went on to say. The Court continued:

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law [*i.e.*, general

⁴² See *supra* note 36, at 23-24.

⁴³ *Id.* at 23.

international law], the right of a State to use its discretion is nevertheless restricted by *obligations which it may have undertaken towards other States*. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then *ceases to apply as regards those States which are entitled to invoke such rules*, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character *and falls outside the scope of the exception contained in this paragraph [i.e., outside a State's exclusive domestic jurisdiction]*⁴⁴ (emphasis added).

What the Court was in fact saying is that within Circle B in our diagrams there is a further circle, Circle C. The area between Circle B and Circle C may be called TD (treaty duties), wherein, as held by the Permanent Court of International Justice in the Case of *The Wimbledon*, quoted above, the exercise of a State's sovereignty is not "lost" but only "restricted."⁴⁵ Consequently, according to the Court, *only the area DJ enclosed by Circle C is a State's domain of exclusive domestic jurisdiction*.

It follows that the Court's statement that the question of domestic jurisdiction is a "relative" one acquires additional significance. It is relative in two further regards. *First*, what constitutes domestic jurisdiction varies from State to State. The answer depends on a State's treaty relations. They can be more or less developed. The more extensive a State's treaty relations are, whether with comparatively more States or covering more subject-matters, the more restricted is going to be its sphere of exclusive domestic jurisdiction. Compare thus Diagram 1 with Diagram 3. *Secondly*, what falls within a State's domestic jurisdiction also varies according to the party concerned to which the question relates; for, in respect of a given matter which is not governed by rules of general international law, the answer depends on whether there is a treaty governing the matter with the party in question. Thus a matter may well be solely within State A's domestic jurisdiction vis-à-vis State C, but not vis-à-vis State B, simply because State A has a treaty with State B covering the matter, but not with State C. Compare Diagram 1 with Diagram 2. Consequently, the answer to the question what is within or without the exclusive domestic jurisdiction of a State is neither static nor absolute or uniform. Domestic jurisdiction is, therefore, in more sense than one, relative.

What is clear, however, is that domestic jurisdiction, which is itself a legal term and a legal concept (the word jurisdiction coming from *jus* and *dicere*, to say the law, lest one forget), is determined by a State's *legal* relations,

⁴⁴ *Id.* at 24.

⁴⁵ See *supra* note 11.

according to whether or not there is a pertinent rule of general international law or a relevant treaty obligation relating to the subject-matter in a concrete situation. The criteria are legal, and the demarcation is clear-cut. In any given situation, vis-à-vis a specific State, a matter either is or is not solely within a State's domestic jurisdiction. It is on either one or the other side of Circle C of the diagrams. One cannot speak of it as being essentially or not essentially inside the area DJ (domestic jurisdiction) enclosed by Circle C. Nor can one do without the criterion of international law, including treaty obligations under it. To do otherwise, as have Article 2(7) of the United Nations Charter and the Connally Reservation, is to show a fundamental misunderstanding of the notion of domestic jurisdiction.

In this regard, it may be of interest to observe that, whilst France's first post-World War II declaration accepting the Optional Clause jurisdiction of the International Court of Justice in 1947⁴⁶ contained a reservation almost identical to the Connally Amendment in the 1946 United States declaration, that declaration was replaced by another in 1959 which not only restored the international law criterion for determining domestic jurisdiction, but also reinstated the word "exclusively" in place of "essentially."⁴⁷ Someone in the Quai d'Orsay obviously realised by then the error in law of the United States Connally Reservation and of the United Nations Charter. However, after the *Nuclear Tests Cases*,⁴⁸ France withdrew her declaration under the Optional Clause altogether in 1974.⁴⁹

What the United Nations has done in practice, apart from its members' constant resort to double standards,⁵⁰ is to interpret the concept of "domestic jurisdiction" *à la John Foster Dulles* (or *à l'Américaine?*) to mean "domestic concern" as opposed to "international concern." This is, as wanted by Mr. Dulles, to substitute a political concept for a technical, legal one. However, this is not the place to discuss the merit or demerit of the practice of the United Nations from the political point of view. From the legal point of view, the whole episode is a typical example of the kind of confusion of language that betrays a confusion in thought condemned by Fred K. Nielsen in the passage quoted at the very beginning of this article.

⁴⁶ 1946-1947 I.C.J.Y.B. 220 (1947). The French declaration was subject to ratification which was deposited only on 1 March 1949. See 1956-1957 I.C.J.Y.B. 212 (1957).

⁴⁷ 1958-1959 I.C.J.Y.B. 212 (1959). Furthermore, this reservation is also no longer "automatic," in the sense that France no longer claims, as in her previous declaration, the right to say what are and what are not matters within her "national jurisdiction."

⁴⁸ 1973 I.C.J. 99, 135.

⁴⁹ 1973-1974 I.C.J.Y.B. 49 (1974).

⁵⁰ See Cheng, *International Law in the United Nations*, 8 YEAR BOOK OF WORLD AFFAIRS 170 (1954), at 193-195, and *passim*.

What now gives particular ground for concern is that one has a sneaking suspicion that behind this confusion in thought lies in addition some woolly idea that domestic jurisdiction is the equivalent, in modern garb, of the erstwhile notion of honour and vital interests that brooks no foreign interference, and that can be determined only by one's own political perception, power, and interpretation. Was this what the United States had in mind when it objected to the jurisdiction of the International Court of Justice in the *Nicaragua Case*?⁵¹ This would be a further reason why there is need, and even urgent need, that the legal concept of domestic jurisdiction should be clarified, shorn off its spurious interpolations, confirmed in its rightful meaning, properly understood, and as soon as possible returned to the purely legal vocabulary.

III. JURIMETRICS

By adding another circle, Circle Y, to the diagrams, marking the extent of the rights which a State acquires from the treaties that it enters into with other States, and labelling the area between Circle Y and Circle X Area TR (treaty rights), one has at a glance a whole representation of a State's rights and duties in relation to a given foreign State under both general international law and all the treaties in force between them. In fact, a complete profile can be built up of a State's legal rights and obligations by having a series of diagrams representing its legal relations with every individual foreign country. The accompanying diagrams provide consequently a basic model for a comprehensive measurement of a State's legal rights and obligations under both general international law and all its treaties with other States. It is believed that such an exercise in jurimetrics can be of both scientific and practical interest,⁵² perhaps not least for politicians who constantly cry wolf at possible loss of sovereignty whenever international commitments are mentioned.

⁵¹ Cf. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction and Admissibility), 1984 I.C.J. 392, especially 434-441 (paras. 94-108); (Merits), 1986 I.C.J. 14, at 26-28 (paras. 32-35, especially para. 34). Compare these contentions with M. Huber's *Second Report* (1924) on British Claims in the Spanish Zone of Morocco (1923), *supra* note 41. See also H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933) (Part III: Political Disputes and the Judicial Function in International Law); and B. Cheng, *supra* note 25, at 92-94, on the distinction between the defence of "rights" and the defence of "interests," and pp. 96-97: *Self-Defence as a Justiciable Issue*, and the United States contention in the Fur Seal Arbitration (1893) at 93, n.77: "[I]t [the United States Government] asserts . . . that the right of self-defence on the part of a nation is a perfect and paramount right to which all others are subordinate, and which upon no admitted theory of international law has ever been surrendered." Cf. Waldock's observation: "A possible explanation of the United States attitude in regard to the reserved domain, both in 1919 at Versailles and in 1945 at San Francisco, is that it had a preconceived idea that there exists in international law a distinct doctrine of reserved powers of States akin to that found in the United States Constitution." See *supra* note 28, at 127. This *idée fixe* persists?

In this regard, it may be of interest to draw attention, *inter alia*, to a perhaps not altogether uncharacteristic speech of Mr. A.D. Sofaer, Legal Adviser of the United States Department of State on *International Law and the Use of Force* (American Society of International Law, PROCEEDINGS 420 (1985), especially pages 428-429, and to some of the rather disturbing revelations in D.P. MOYNIHAN, *ON THE LAW OF NATIONS* (1990).

⁵² Cf. also *Inter Astra Silent Leges*, *supra* note 16, which bears the subtitle: *Prolegomena to Jural Cartography*.